RECORDS AND BRIEFS

Supreme Court, U.S.
FILED
JUL - 8 2015
OFFICE OF THE CLERK

No. 14-1055

IN THE

# Supreme Court of the United States

CRYSTAL LIGHTFOOT
AND BEVERLY HOLLIS-ARRINGTON,
*Petitioners,*

v.

CENDANT MORTGAGE CORP., ET AL.
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Andrew H. Friedman
Gregory D. Helmer
HELMER FRIEDMAN, LLP
8522 National Boulevard,
Suite 107
Culver City, CA 90232
(310) 396-7714

E. Joshua Rosenkranz
*Counsel of Record*
Robert M. Loeb
Matthew L. Bush
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

*Counsel for Petitioners*

## TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES ..... ii

ARGUMENT ..... 1

I. The Ninth Circuit erroneously read the *Red Cross* ruling as to a non-stock entity to apply to Fannie Mae, a publicly traded stock entity with a distinct sue-and-be-sued clause ..... 1

II. The courts of appeals and district courts are divided ..... 7

III. The case presents an excellent vehicle to resolve an important and recurring issue ..... 10

CONCLUSION ..... 13

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*American Nat'l Red Cross v. S.G.*,
505 U.S. 247 (1992).....1, 2, 5, 6, 7, 8, 9

*Bor-Son Bldg. Corp. v. Heller*,
572 F.2d 174 (8th Cir. 1978).....8

*Califano v. Sanders*,
430 U.S. 99 (1977).....2

*Fannie Mae v. Lopez*,
No. 1:11-CV-00757 LJO JLT, 2011 WL 4929548 (E.D. Cal. Oct. 17, 2011), *report and recommendation adopted by*, No. 1:11-CV-00757 LJO JLT, 2011 WL 5374592 (E.D. Cal. Nov. 2, 2011) .....9

*Fannie Mae v. Song Wha Lee*,
No. 3:10-CV-1047-L, 2010 WL 3025533 (N.D. Tex. July 30, 2010).. .....9

*Fed. Nat'l Mortg. Ass'n v. Brooks*,
No. CV 12-00109 MMM FFM, 2012 WL 773073 (C.D. Cal. Mar. 7, 2012).....9

*Fed. Nat'l Mortg. Ass'n v. Busby*,
No. 2:14-CV-1661-VEH, 2014 WL 4957201 (N.D. Ala. Oct. 1, 2014).....9

*Fed. Nat'l Mortg. Ass'n v. Goode*,
No. 4:11-CV-00016, 2011 WL
3349810 (W.D. Va. Aug. 3, 2011) .....9

*Fed. Nat'l Mortg. Ass'n v. Palmer*,
No. 1:11-CV-00238-EJL, 2011 WL
5910062 (D. Idaho Nov. 28, 2011).....9

*Fed. Nat'l Mortg. Ass'n v. Rummo*,
No. 13-2702-STA-TMP, 2013 WL
6843083 (W.D. Tenn. Dec. 27, 2013).....9

*Fed. Nat'l Mortg. Ass'n v. Smith*,
No. 3:13-CV-1091-K-BN, 2013 WL
1759521 (N.D. Tex. Apr. 5, 2013),
*report and recommendation adopted by*, No. 3:13-CV-1091-K, 2013 WL
1763479 (N.D. Tex. Apr. 24, 2013).....9

*Fed. Nat'l Mortg. Ass'n v. Young*,
No. 2:12-CV-471-MSD-FBS, 2013
WL 5488513 (E.D. Va. Aug. 12,
2013).....9

*Jewish Ctr. for Aged v. U.S. Dep't of Hous. & Urban Dev.*,
No. 406-CV-1739 JCH, 2007 WL
763928 (E.D. Mo. Mar. 9, 2007) .....8

*Johnson v. Sec'y of & U.S. Dep't of Hous. & Urban Dev.*,
710 F.2d 1130 (5th Cir. 1983).....8

*Johnson v. United States*,
502 F. App'x 412 (5th Cir. 2012) .....8

*Lightfoot v. Cendant Mortg. Corp.*,
465 F. App'x 668 (9th Cir. 2012) .....11

*N.L.R.B. v. Catholic Bishop of Chicago*,
440 U.S. 490 (1979).....6

*Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust ex rel. Fed. Nat'l Mortg. Ass'n v. Raines*,
534 F.3d 779 (D.C. Cir. 2008).....2, 5, 6

*Steel Co. v. Citizens for a Better Env't*,
523 U.S. 83 (1998).....10

*Tenn. Valley Auth. v. Hill*,
437 U.S. 153 (1978).....5

*Veneruso v. Mount Vernon Neighborhood Health Ctr.*,
933 F. Supp. 2d 613 (S.D.N.Y. 2013), *aff'd*, 586 Fed. App'x 604 (2d Cir. 2014).....3

*Verlinden B.V. v. Cent. Bank of Nigeria*,
461 U.S. 480 (1983).....6

**Statutes**

28 U.S.C. § 1349 .....3

36 U.S.C. § 130501 .....6

Pub. L. No. 93-383, § 806(b), 88 Stat. 633, 727 (codified at 12 U.S.C. § 1717(a)(2)(B)) .....4

## ARGUMENT

### I. The Ninth Circuit erroneously read the *Red Cross* ruling as to a non-stock entity to apply to Fannie Mae, a publicly traded stock entity with a distinct sue-and-be-sued clause.

1. The Ninth Circuit erroneously read this Court's *Red Cross* ruling, *American National Red Cross v. S.G.*, 505 U.S. 247 (1992), as adopting a formulaic rule: If a sue-and-be-sued clause mentions federal courts, then it confers federal jurisdiction over all claims against the entity, even those that are purely a matter of state law.[1] And in its opposition, Fannie asks this Court to embrace that misreading of *Red Cross*. *See* Opp. 15.

Contrary to the suggestion of the Ninth Circuit and respondent, however, this Court never said that including the phrase "federal courts" was by itself "necessary and sufficient" to confer jurisdiction. Pet.App. 11a. What this Court actually said in *Red Cross* was: "[O]ur readings of [prior sue-and-be-sued] provisions not only represented our best efforts at divining congressional intent retrospectively, but have also placed Congress on prospective notice of the language necessary and sufficient to confer jurisdiction." *Red Cross*, 505 U.S. at 252. The Court

---

[1] *See* Pet.App. 6a ("[A] sue-and-be-sued clause for a federally chartered corporation confers federal question jurisdiction if it specifically mentions federal courts."); *id.* at 11a ("[A] specific reference to the federal courts was 'necessary *and sufficient* to confer jurisdiction.'").

made clear that a mention of federal courts was *not* on its own sufficient. The Court held that "a congressional charter's 'sue and be sued' provision *may* be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts." *Id.* at 255 (emphasis added). Thus, a court need not read a sue-and-be-sued clause that mentions federal courts to confer jurisdiction.

As Judge Brown of the D.C. Circuit observed, it is a gross misreading of *Red Cross* to have jurisdiction turn solely on the reference to "federal courts:" "[I]f a mere textual mention of federal courts was sufficient, then the *Red Cross* Court wasted many pages articulating other rationales and examining the jurisprudential backdrop against which Congress enacted the Red Cross charter." *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust ex rel. Fed. Nat'l Mortg. Ass'n v. Raines*, 534 F.3d 779, 795 (D.C. Cir. 2008) (Brown, J. concurring).

Properly read, Fannie's charter does not confer federal jurisdiction over state law claims.[2] The phrase "of competent jurisdiction" makes Fannie's clause unlike the Red Cross' because it "look[s] to outside sources of jurisdictional authority." *Califano v. Sanders*, 430 U.S. 99, 106 n.6 (1977). Even the Red Cross recognized that those added words change

---

[2] Fannie's suggestion that we "all but admit that *Red Cross* compels the result" is nonsensical. Opp. 20. We have always maintained that Fannie's charter is materially different from the Red Cross'. *See* Pet. 14 ("Fannie Mae's congressional charter is significantly distinguishable."); Lightfoot C.A.Br. 10-11 ("The Red Cross' clause is distinguishable from Fannie Mae's clause.").

the equation. It told this Court that "[t]he 'of competent jurisdiction' language [in certain charters including Fannie's] weakens the case for construing the statute as a grant of original federal jurisdiction, since a statute containing that language might be read to presuppose that jurisdiction is determined by some body of law other than the sue-and-be-sued clause itself." Brief for Petitioner, *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247 (1992) (No. 91-594), 1992 WL 532904, at *32 n.4.

2. Fannie differs from the Red Cross in another important way. Unlike the Red Cross, Fannie is a publicly traded corporation. *See* Opp. ii. Congress has provided a specific rule for determining when a publicly traded corporation is to be treated as a federal entity for the purposes of federal jurisdiction. Under 28 U.S.C. § 1349, district courts have federal jurisdiction *if* the United States owns "more than one-half of [the corporation's] capital stock." That is the governing rule.

This Court found that § 1349 did not dictate a controlling rule as to the Red Cross because the Red Cross is a "nonstock corporation." The Court held that "the effect of [§ 1349, if any,] on nonstock corporations like the Red Cross is unclear." *Red Cross*, 505 U.S. at 251; *see also Veneruso v. Mount Vernon Neighborhood Health Ctr.*, 933 F. Supp. 2d 613, 630 (S.D.N.Y. 2013) ("[T]he Court has declined to resolve the question."). Because it did not deem the statute directly applicable to the Red Cross, this Court proceeded to look to more indirect indicia to determine whether Congress would have wanted federal courts

to have jurisdiction over all claims involving the Red Cross.

But for stock-based federally chartered corporations like Fannie, Congress made its intent plain in § 1349. Such entities are only to be treated as federal entities for the purposes of federal jurisdiction if the United States owns more than 50% of the corporation's capital stock. Given this clearly stated rule, it is error for a court to infer a right to federal jurisdiction from the term "federal courts" in Fannie's sue-and-be-sued clause. There is simply no need for such judicial inferences where Congress has unambiguously spelled out the governing rule.

3. The legislative history also shows that the Ninth Circuit erred in extending federal jurisdiction to all claims involving Fannie. For example, in 1974, Congress amended Fannie's charter providing that Fannie "shall be deemed, for purposes of jurisdiction and venue in civil actions, to be a District of Columbia corporation." Pub. L. No. 93-383, § 806(b), 88 Stat. 633, 727 (codified at 12 U.S.C. § 1717(a)(2)(B)). Through this amendment, Congress "intended to allow Fannie Mae to access the federal courts via diversity jurisdiction pursuant to 28 U.S.C. § 1332." Pet.App. 38a (Stein, J. dissenting). This amendment was necessary to provide diversity jurisdiction because "federally chartered corporations are not 'citizens' of any 'State' for the purposes of section 1332." *Id.* But providing diversity jurisdiction would have been pointless if Fannie's sue-and-be-sued clause already conferred federal jurisdiction.

4. Fannie's distinct sue-and-be-sued clause language and history, and the fact that Fannie is a publicly traded stock corporation, all show that it was a mistake by the court of appeals to read *Red Cross* as adopting a simplistic rule, looking only to whether the clause references "federal courts." But if *Red Cross* did adopt such a rule, this Court should grant review in this case and revisit the wisdom of that rule. The Ninth Circuit's reading of *Red Cross* and application of its "rule" to Fannie demonstrates that Justice Scalia was correct in observing that the Court's ruling was a "wonderland of linguistic confusion—in which words are sometimes read to mean only what they say and other times read also to mean what they do not say." *Red Cross*, 505 U.S. at 265 (Scalia, J. dissenting).

The Ninth Circuit decision dives head first through the looking glass. Its analysis tracks Humpty Dumpty's reasoning: "When *I* use a word ... it means just what *I* choose it to mean—neither more nor less." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173 n.18 (1978) (quoting *Through The Looking Glass*, in *The Complete Works Of Lewis Carroll* 196 (1939)). Respondent's argument requires a court to read the three-word phrase "of competent jurisdiction" as having *four* separate meanings.[3] Yet all four

---

[3] First, Fannie claims that the phrase "of competent jurisdiction" helps "clarify that ... litigants in state courts of limited jurisdiction must satisfy the appropriate jurisdictional requirements." Fannie C.A. Opening Br. 24 (quoting *Pirelli*, 534 F.3d at 785). Second, "[i]t also makes clear that 'litigants, whether in federal or state court, must establish that court's *personal* jurisdiction over the parties.'" *Id.* (quoting *Pirelli*, 534 F.3d at 785). Third, "[t]he phrase also establishes that

sidestep the natural reading of the words—as referring to courts that have an independent basis for jurisdiction.

Fannie's reading of a reference to "federal courts" in a sue-and-be-sued clause as itself dispositive of the subject-matter jurisdiction issue also runs into serious constitutional problems. In "*Osborn*, this Court held that Article III's 'arising under' jurisdiction is broad enough to authorize Congress to confer federal-court jurisdiction over actions involving federally chartered corporations." *Red Cross*, 505 U.S. at 264. But this Court has previously recognized that "[t]he breadth of that conclusion has been questioned." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 492 (1983). It would be highly questionable, for example, for Congress to extend Article III jurisdiction over all federally charted entities, such as the Little League Baseball, *see* 36 U.S.C. § 130501, even if the entity is not in any real sense an arm of the federal government or exercising the powers of the federal government.

Similarly, it would raise serious Article III issues to extend jurisdiction to a federally traded stock corporation, which is not majority owned by the United Sates. *See N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) (rejecting an interpretation

---

'litigants relying on the "sue-and-be-sued" provision can sue in federal district courts.'" *Id.* at 26 (quoting *Pirelli*, 534 F.3d at 785). Fourth, it somehow also limits federal jurisdiction to only federal courts that do not "otherwise impose[] additional jurisdictional requirements, such as the Court of International Trade or the Court of Claims." *Id.*

of a statute where it "would give rise to serious constitutional questions"). Such a corporation is doing the bidding of its stockholders. Congress recognized that extending jurisdiction to such stock corporations could be problematic and therefore in § 1349 adopted a rule that such federally-chartered stock corporations that are not majority owned by the U.S. should *not* be treated as federal entities for Article III purposes. The Ninth Circuit and respondent err by failing to heed to that congressional choice.

## II. The courts of appeals and district courts are divided.

As detailed in the petition and the dissent, four circuit courts have ruled that a nearly identical sue-and-be-sued clause does not confer jurisdiction. *See* Pet. 17-18; Pet.App. 27a. Fannie tries to wish away the circuit split because those decisions were issued before *Red Cross*. But *Red Cross* "announced no new rule of law." Pet.App. 27a (Stein, J. dissenting). The Court said that the rule at issue was "established" in 1824 by *Osborn* and *Deveaux*. *Red Cross*, 505 U.S. at 253, 256. And the Court explained how it had "appl[ied]" that rule as far back as 1916 in *Bankers' Trust*. *Id.* at 256.

While the parties disagree about what rule the Court applied in *Red Cross*, it is not in dispute that this Court did not purport to change the existing law. See Opp. 16. *Red Cross* was simply another application of a rule that was fully available to the courts of appeals that make up the circuit split.

Moreover, Fannie has not identified one circuit that has concluded its prior precedent has been undermined or altered by *Red Cross*. And those earlier decisions are still being actively followed. For example, the Fifth Circuit has adhered to its ruling that the nearly identical sue-and-be-sued clause in 12 U.S.C. § 1702 does not confer jurisdiction as recently as 2012. *See Johnson v. United States*, 502 F. App'x 412, 417 (5th Cir. 2012) (quoting *Johnson v. Sec'y of & U.S. Dep't of Hous. & Urban Dev.*, 710 F.2d 1130, 1138 (5th Cir. 1983) ("[W]e have previously held that 'section 1702 ... is neither a grant of jurisdiction nor a waiver of the United States generally.'"). Similarly, a district court in the Eighth Circuit considered itself bound by *Bor-Son Building Corp. v. Heller*, 572 F.2d 174, 181 (8th Cir. 1978). The district court stated that *Bor-Son* "represents the Eighth Circuit's definitive holding on this issue." *Jewish Ctr. for Aged v. U.S. Dep't of Hous. & Urban Dev.*, 2007 WL 763928, at *4 (E.D. Mo. Mar. 9, 2007).

Fannie also asks the Court to ignore the vast disarray in the district courts concerning the proper interpretation of these sue-and-be-sued clauses. *See* Pet. 18-20. Similar disagreement caused the Court to grant certiorari in *Red Cross*. The first reason the Court gave for taking that case was that "[a]lthough more than 40 district court cases have considered this issue, no result clearly predominates." *Red Cross* 505 U.S. at 250 n.1.

The confusion is so rampant here that even Fannie does not know whether federal jurisdiction exists in any case where it's a party. As a plaintiff, Fannie has repeatedly moved to *remand* cases back to state

court. *See, e.g.*, *Fed. Nat'l Mortg. Ass'n v. Young*, 2013 WL 5488513 (E.D. Va. Aug. 12, 2013); *Fed. Nat'l Mortg. Ass'n v. Rummo*, 2013 WL 6843083 (W.D. Tenn. Dec. 27, 2013); *Fed. Nat'l Mortg. Ass'n v. Goode*, 2011 WL 3349810 (W.D. Va. Aug. 3, 2011); *Fed. Nat'l Morg. Ass'n v. Busby*, 2014 WL 4957201 (N.D. Ala. Oct. 1, 2014); *Fannie Mae v. Lopez*, 2011 WL 4929548 (E.D. Cal. Oct. 17, 2011) *report and recommendation adopted by* 2011 WL 5374592 (E.D. Cal. Nov. 2, 2011); *Fed. Nat'l Mortg. Ass'n v. Brooks*, 2012 WL 773073, at *1 (C.D. Cal. Mar. 7, 2012); *Fannie Mae v. Song Wha Lee*, 2010 WL 3025533, at *1 (N.D. Tex. July 30, 2010); *Fed. Nat'l Mortg. Ass'n v. Smith*, 2013 WL 1759521, at *2 (N.D. Tex. Apr. 5, 2013) *report and recommendation adopted by*, 2013 WL 1763479 (N.D. Tex. Apr. 24, 2013).

In one case, Fannie argued that "no ... basis for original jurisdiction ... exists." Plaintiff's Memorandum in Support of Motion to Remand at 4, *Fed. Nat'l Mortg. Ass'n v. Palmer*, No. 11-cv-00238 (D. Idaho July 12, 2011). In fact, Fannie even asked for, and received, attorney's fees on the ground that the attempted removal was frivolous and "lacked an objectively reasonable basis." *Id.* at 7; *see Fed. Nat'l Mortg. Ass'n v. Palmer*, 2011 WL 5910062, at *4 (D. Idaho Nov. 28, 2011).

In *Red Cross*, this Court stated that its cases were an attempt to give "prospective notice" to Congress about how to draft sue-and-be-sued clauses. *Red Cross*, 505 U.S. at 252. Given the widespread confusion among the federal courts, the job is not yet done.

## III. The case presents an excellent vehicle to resolve an important and recurring issue.

In our petition, we explained that since the housing market crashed, the number of cases involving Fannie increased dramatically. Pet. 21. In fact, according to PACER, over 3,500 cases have been filed in federal court with Fannie as a party since the beginning of 2007. And countless others have surely been filed in state court. On top of that, numerous other entities have similar language in their charter. Fannie never contests the importance of the question presented.

Thus, there is a vital need for clarity as to the jurisdictional rule to apply to Fannie. And this case provides the perfect vehicle for providing that clarity. The Ninth Circuit was presented with a single issue and it resolved a single issue: whether "Fannie Mae's federal charter confers federal question jurisdiction over claims brought by or against Fannie Mae." Pet.App. 4a. The majority and dissent devoted 36 pages to that question and that question alone.

Despite this clean opportunity to address the issue, Fannie conjures up two purported reasons as to why this case is a bad vehicle. First, Fannie argues that the Court should not address whether the district court had jurisdiction because it believes our underlying claims are meritless. Opp. 27. But jurisdiction is "a threshold question that must be resolved ... before proceeding to the merits." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998).

Second, Fannie argues that even if the Court ruled in petitioners' favor, the posture of the case "casts doubt" on whether we could obtain a remand to state court. Opp. 27. There's no doubt about it: we would get a remand. According to Fannie, the parties wasted a lot of the Ninth Circuit's time on a decision that has no practical effect, but Fannie waited until now to raise the problem. This defect is just an illusion. Petitioners filed their claims in state court. Fannie removed to federal court, and our motion to remand was denied. If that decision were reversed, all subsequent decisions on the merits would be erased, and the case would be remanded to state court.

But according to Fannie, our ability to get a remand to state court is uncertain because "[t]he only question that the Ninth Circuit considered on the merits in the current appeal was whether the district court abused its direction in denying petitioners' Rule 60(b) motion to reopen the judgment." Opp. 27-28.

That is simply not true. The Ninth Circuit affirmed on the merits "for the reasons stated in [its] previous unpublished disposition." Pet.App. 21a. That unpublished decision states that we appealed "from the district court's judgment dismissing [our] action arising out of foreclosure proceedings as barred by the doctrine of res judicata" in addition to "the order denying [our] motion to set aside the judgment" under Rule 60(b). *Lightfoot v. Cendant Mortgage Corp.*, 465 F. App'x 668, 669 (9th Cir. 2012). Below, Fannie even acknowledged that "[i]n this appeal, plaintiffs ask this Court to review the

district court's order dismissing their claims." Fannie C.A. Opening Br. 36. Fannie's claim that the Ninth Circuit did not consider the merits rings particularly hollow since Fannie devoted a whole section of its brief to the merits, which was entitled "The District Court Properly Dismissed Plaintiffs' Claims On Res Judicata Grounds." *See id.* at 37-41.

In any event, what merits arguments the Ninth Circuit considered on appeal is irrelevant. We could have argued before the Ninth Circuit only that the district court lacked jurisdiction without raising any merits arguments at all. Had we won, we would have been entitled to remand to state court, wiping out the adverse lower court decision on the merits. If we win before this Court, we will get the same result.

This case clearly presents an important and recurring question that affects not just this case, but countless others.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Andrew H. Friedman
Gregory D. Helmer
HELMER FRIEDMAN, LLP
8522 National Boulevard,
Suite 107
Culver City, CA 90232
(310) 396-7714

E. Joshua Rosenkranz
*Counsel of Record*
Robert M. Loeb
Matthew L. Bush
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Date: July 8, 2015